ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1184

SIERRA CLUB,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and LISA P. JACKSON, Administrator,

Respondents.

Petition for Review of Final Administrative Action of the
United States Environmental Protection Agency

PROOF REPLY BRIEF FOR PETITIONER

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

§ 112(c)(6) Memo	EPA, Emission Standards for Meeting the Ninety Percent Requirement Under Section 112(c)(6) of the Clean Air Act, EPA-HQ-OAR-2004-0505-0006
"the Act" or "CAA"	Clean Air Act
Aerospace Facilities	Aerospace manufacturing and rework facilities
APA	Administrative Procedure Act
Br.	Brief for Petitioners
Chemical Plants	Synthetic Organic Chemical Manufacturing Industry
Def. Opp.	Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment on Remedy, *Sierra Club v. Jackson*, D.D.C. No. 01-1537
Def. Reply	Defentant's Reply Memorandum Of Points And Authorities In Support Of Defendant's Cross-Motion For Summary Judgment On Remedy, *Sierra Club v. Jackson*, D.D.C. No. 01-1537
Determination	EPA's May 21, 2011 determination that it has met the requirements of § 112(c)(6)
"EPA" or "the agency"	Respondents U.S. Environmental Protection Agency and Lisa P. Jackson, Administrator
EPA Br.	Brief for Respontents

HAPs	Hazardous Air Pollutants
HCB	Hexachlorobenzene
Int. Br.	Brief for Intervenors
JA	Joint Appendix
MACT	Maximum Achievable Control Technology
PCBs	Polychlorinated Biphenyls
POM	Polycyclic Organic Matter

SUMMARY OF ARGUMENT

EPA's brief confirms that Clean Air Act § 112(c)(6) unambiguously requires EPA to set standards for the emissions of polychlorinated biphenyls (PCBs), polycyclic organic matter (POM) and hexachlorobenzene (HCB) from the sources that the agency lists under § 112(c)(6). It further confirms that there is absolutely no evidence, record or otherwise, to show that EPA has ever promulgated these standards. Unable to defend on the merits its claim to have satisfied § 112(c)(6), EPA seeks to insulate that claim from judicial review by raising a variety of standing and timeliness arguments.

Standing. EPA argues that Sierra Club lacks standing because it has not shown that setting MACT standards for PCBs, POM and HCB would provide better protection than is provided already by the agency's existing regulations which, according to the agency's lawyers, control these pollutants effectively via emissions standards for "surrogates." But Sierra Club has shown that EPA has not even purported to set standards for emissions of PCBs, POM and HCB from several source categories, and it is reasonably likely that MACT standards for these pollutants will provide better protection than no standards at all. EPA's lawyers' *post hoc* claim that the agency has set standards for these pollutants through surrogates lacks any support in the record and is, in any event, a merits argument.

Intervenors argue that Sierra Club's injuries are traceable only to the individual rules that EPA set for the categories EPA listed under § 112(c)(6) and not to EPA's determination that it completed sufficient standards to satisfy § 112(c)(6), 76 Fed. Reg. 15, 308 (March 21, 2011) ("Determination").[1] It is in the Determination, however, that EPA claims for the first time that it has satisfied § 112(c)(6)'s ninety percent requirement and has no further duty to set standards. By purporting to terminate EPA's nondiscretionary duty to set standards for PCBs, POM, and HCB – even though these standards have never been issued – the Determination prolongs and increases the undisputed harm caused by emissions of these pollutants.

Regarding its failure to provide notice and comment opportunity, EPA argues that the comments Sierra Club would have submitted go to other rules rather than the Determination and that the agency would therefore have ignored them. As EPA acknowledges, however, the comments would have explained that EPA's Determination is incorrect. Had EPA received and considered these comments, it may not have issued the Determination.

Timeliness. Contrary to EPA's claims, the present case seeks review of only one action, the agency's March 21, 2011 Determination that it has met the

[1] EPA refers to the Determination as the "90 Percent Notice" or "Notice." EPA Br. at 1.

requirements of § 112(c)(6). This case does not seek any relief except vacatur of that Determination, and does not challenge any claim or conclusion made in any prior rule.

EPA argues that even if the present case is timely, Sierra Club could and should have sought review of the agency's implementation of § 112(c)(6) in challenges to prior rules. Because the Clean Air Act provides for review of the Determination, that argument is irrelevant. Further, it would have been impossible to challenge EPA's failure to satisfy § 112(c)(6)'s ninety percent requirement in challenges to prior rules. And, in any event, EPA represented in prior litigation that the Determination would be a judicially reviewable final action that explained how EPA's emission standards collectively meet that requirement.

Merits. EPA agrees that § 112(c)(6) requires it to set emission standards for the hazardous air pollutants (including PCBs, POM and HCB) that § 112(c)(6) enumerates. The agency, however, argues that it has discretion to do so via surrogates. Because nothing in the record shows that EPA has set standards for PCBs, POM, and HCB either directly or through surrogates, EPA's argument is irrelevant. EPA's lawyers' attempt to show that the agency set surrogate standards is an impermissible *post hoc* rationale and, in any event, refuted by the extra-record evidence on which they seek to rely.

Notice and Comment. EPA's claim that the Determination did not require notice and comment because it "left the world just as it found it" is belied by the Determination's text, purpose, and effect, which show that it substantively changes the regulatory regime and jeopardizes Sierra Club's rights. By conceding that the Determination is reviewable final action, EPA effectively acknowledges that the Determination has legal consequences.

ARGUMENT

I. SIERRA CLUB HAS STANDING TO CHALLENGE EPA'S CLAIM THAT IT HAS COMPLETED ITS OBLIGATIONS UNDER CLEAN AIR ACT § 112(c)(6).

A. Sierra Club Has Standing To Challenge The Determination.

EPA does not dispute that Sierra Club has shown injury in fact and causation, but claims that vacating the Determination would not redress Sierra Club's injuries. EPA Br. at 23-24. Specifically, EPA claims Sierra Club provides "no evidence" that the agency's existing regulations for sources that emit PCBs, POM and HCB "fail to effectively control" these pollutants. *Id.* at 23. EPA goes on to assert that even if it "were forced to … set numeric limitations specifically naming" PCBs, POM and HCB, there is no basis to believe that such standards would provide any protection beyond that already provided through "regulation by surrogates or other control measures." *Id.* at 23-24.

Contrary to EPA's claim, Sierra Club has provided ample evidence that existing regulations do not "effectively control" PCBs, POM, and HCB, far less provide the highly protective level of control required by Clean Air Act § 112. As explained in Sierra Club's opening brief, EPA has never set emission standards of any kind for PCBs, POM, and HCB from several of the source categories on which its Determination relies. Br. at 10-13, 27-28. The notion that EPA's existing regulations establish such standards – directly, via "surrogates," or otherwise – is a *post hoc* fabrication by EPA's lawyers. EPA itself has never so claimed in the record or elsewhere, and the records for the underlying § 112 and § 129 rules on which EPA's lawyers now seek to rely (at 43-48) make clear that the agency did not set such standards. *See infra* at 20-24. In any event, the absence of standards for these pollutants is a component of Sierra Club's case on the merits that the Court must take as true in determining standing. *Parker v. District of Columbia*, 478 F.3d 370, 377 (D.C. Cir. 2007) ("[W]hen considering whether a plaintiff has Article III standing, a federal court must assume *arguendo* the merits of his or her legal claim.").

Because EPA has not set standards for PCBs, POM, and HCB at all, vacating the Determination will not merely force EPA to set standards "specifically naming the section 112(c)(6) HAPs," EPA Br. at 23 (emphasis added). Rather, it will restore EPA's nondiscretionary duty to set first-time-ever standards for these

hazardous air pollutants. 42 U.S.C. § 7412(c)(6). Those standards will have to "require the maximum degree of reduction in emissions . . . that the Administrator . . . determines is achievable" through the full range of potential emission control strategies, including process changes, changes in inputs, and stack controls. *Id.* § 7412(d)(2); *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 863 (D.C. Cir. 2001). Further, regardless of what EPA considers "achievable," EPA's standards for PCBs, POM, and HCB will have to reflect the emission levels achieved "by the best performers (those with the lowest emission levels)," *Sierra Club v. EPA*, 479 F.3d 875, 880 (D.C. Cir. 2007). If EPA wishes to set standards via surrogates rather than directly, *see* EPA Br. at 40, the agency must identify the surrogates, set emission standards for the identified surrogates under § 112(d)(2)-(3), ensure that these standards reduce emissions of PCBs, POM, and HCB sufficiently to satisfy § 112(d)(2)-(3), and support those determinations with record evidence. *See Mossville Environmental Action Now v. EPA*, 370 F.3d 1232, 1242-43 (D.C. Cir. 2004) (vacating rule where EPA failed to establish valid surrogacy relationship); *Sierra Club v. EPA*, 353 F.3d 976, 984 (D.C. Cir. 2004) (describing test for valid surrogate).

The opportunity to obtain MACT standards for toxic pollutants that are not currently subject to any standards at all easily satisfies the test for redressability in this Court's standing cases. *See America's Community Bankers v. FDIC*, 200 F.3d

822, 828-29 (D.C. Cir. 2000) ("Where an agency rule causes the injury, the redressability requirement may be satisfied . . . by vacating the challenged rule and giving the aggrieved party the opportunity to participate in a new rulemaking the results of which might be more favorable to it."); *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 457-58 (D.C. Cir. 1998) (vacating rule "could remedy [petitioner's] injury by requiring EPA to undertake a new rulemaking"); *Competitive Enter. Inst. v. NHTSA*, 901 F.2d 107, 117-18 (D.C. Cir. 1990) (petitioners challenging agency action "need not prove that granting the requested relief is certain to redress their injury").

Intervenors contend, in an argument not joined by EPA, that Sierra Club has not demonstrated causation because "any injury . . . is traceable only to [prior] rules" that failed to set the required standards. Int. Br. at 17. EPA's failure to include standards for PCBs, POM and HCB in prior rules, however, did not prevent the agency from setting them subsequently to meet its obligations under § 112(c)(6). The whole purpose of the Determination is to conclude that EPA has fully complied with its obligations under § 112(c)(6) and does not have to set any additional standards, despite the fact that EPA still has not issued the standards for PCBs, POM, and HCB that § 112(c)(6) undisputedly requires. The Determination itself, therefore, deprives Sierra Club members of the protection that emission standards for PCBs, POM and HCB would provide – prolonging and increasing the

undisputed harm caused by emissions of these pollutants from coke ovens, chemical plants, refineries, and incinerators identified in Sierra Club's members' declarations.

B. Sierra Club Has Standing To Challenge EPA's Failure To Provide Notice And Comment Opportunity.

EPA argues that its failure to provide notice and opportunity to comment on the Determination was not causally connected to its failure to set emission standards for PCBs, POM and HCB. EPA Br. at 24-26. EPA claims that because the Determination "was not itself a vehicle for imposing any emission standards," comments explaining that the agency has not met its obligations under § 112(c)(6) go to the substance of "prior standards" and would have been "untimely and inapposite" as comments on the Determination. *Id.* at 26.

EPA's claim that comments on the Determination actually pertain to prior rules is refuted by the agency's acknowledgement that "Sierra Club would have submitted comments on the [Determination] stating that 'all sources accounting for ninety percent of the emissions of each these … [section 112(c)(6) HAPs] are not subject to emissions standards as § 112(c)(6) requires and that EPA's determination is therefore incorrect.'" EPA Br. at 24-25 (*quoting* Carman, Decl. at ¶ 7) (emphasis added). Comments pointing out that the Determination is incorrect address the Determination, not other rulemakings.

Further, although EPA's Determination "was not itself a vehicle for imposing any emission standards," *id.* at 26, the Determination purports to relieve the agency from any further obligation to set standards under § 112(c)(6). *See also* Br. at 26, 37; Carman Decl. at ¶¶ 7-9. Had EPA provided an opportunity to comment on the Determination and considered Sierra Club's comments, the agency may not have issued the Determination at all. Thus, EPA's decision to issue the Determination without notice and comment opportunity is connected to the agency's ongoing failure to promulgate the emission standards for PCBs, POM, and HCB that § 112(c)(6) undisputedly requires. *See Cnty. of Delaware, Pa. v. Dep't of Transp.*, 554 F.3d 143, 147 (D.C. Cir. 2009) ("[A] litigant 'who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result.'") (*quoting Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 94–95 (D.C. Cir. 2002)).

Moreover, EPA has represented in a prior case that the Determination would be a judicially reviewable action in which the agency "explain[ed] how" EPA's emission standards satisfied the agency's obligations under § 112(c)(6). Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary

Judgment on Remedy ("Def. Opp.") at 19 n16, JA__. *See* EPA Br. at 13. Comments pointing out that EPA's current standards do not satisfy these obligations would have been directly relevant to that "expla[nation]." That EPA disagrees with commenters about what the Act requires does not absolve EPA of the obligation to take comment or render the agency's failure to provide opportunity for comment any less "connected to the substantive result." *See Sugar Cane Growers*, 289 F.3d at 94–95.

II. SIERRA CLUB'S CHALLENGE IS TIMELY.

A. The Present Case Seeks Review Of EPA's Determination, Not Prior Rules.

There is no dispute that Sierra Club filed its petition for review of EPA's Determination within the 60-day review period provided by section 307(b). EPA argues, however, that the present case is actually an untimely "collateral" challenge to the "content" of the § 112 and § 129 rules on which the Determination relies. EPA Br. at 27-29. In particular, EPA argues that the present case challenges the agency's alleged use of surrogates to meet its § 112(c)(6) obligations in those individual rules. *Id.* at 28.

The present case seeks review of only one action, the agency's March 21, 2011 Determination that it has completed its obligations under § 112(c)(6). *See* Petition for Review; Br. at 37 (requesting vacatur of Determination). Sierra Club

asserts that because the sources of ninety percent of the emissions of PCBs, POM and HCB are not subject to standards for these pollutants, they are not "subject to standards" within the undisputed meaning of § 112(c)(6), and the agency's determination that it "has completed sufficient standards to meet the 90 percent requirement," 76 Fed. Reg. at 15,308, JA__, is unlawful and arbitrary. Br. at 27-28, 29-30. Review of the Determination as unlawful and arbitrary is timely and within this Court's jurisdiction.

Contrary to EPA's claims, the present case does not challenge any conclusion reached in the agency's prior rules and does not seek any relief with respect to those rules. In particular, it does not challenge EPA's discretion to use reasonable surrogates, or EPA's "application[]" of § 112(c)(6), EPA Br. at 29. Indeed, there are no "applications" of § 112(c)(6) to review in many of the rules on which the Determination relies. As shown in Sierra Club's opening brief and below, these rules do not even mention § 112(c)(6), far less "appl[y]" it, and they do not purport to set emission standards for PCBs, POM, or HCB, directly or through surrogates. *See infra* at 20-24. Nor do they contain any conclusion that such standards were not necessary to comply with section 112(c)(6). *Cf. infra* at

22-23. Because the present case does not challenge any conclusion reached in the prior rules, it is not a collateral attack on those rules.[2]

Finally, EPA's suggestion that Sierra Club could obtain relief through future administrative petitions, EPA Br. at 30-31, is not only irrelevant but misleading. It is undisputed that § 112(c)(6) creates a clear statutory duty to set standards for emissions of PCBs, POM, and HCB from the sources it lists under § 112(c)(6). Br. at 27-28; EPA Br. at 40. Although more than a decade has passed since November 15, 2000, when § 112(c)(6) required EPA to issue these standards, the agency still has not done so. Br. at 10-13, 27-28, 29-30. Thus, but for EPA's Determination that its § 112(c)(6) obligations are complete, the agency would be subject to an unmet statutory deadline. As EPA is well aware, no deadlines govern its responses to administrative petitions for rule revisions. By seeking to avoid review of its Determination, EPA effectively asks the Court to eliminate an enforceable deadline for an unmet statutory duty to issue long-overdue emission standards and leave in its place only the opportunity to submit pleas that EPA issue these standards as a matter of discretion.

[2] EPA suggests that Sierra Club brings the present case now because the agency has changed its interpretation of § 112(c)(6). EPA Br. at 30-31. Although EPA has offered conflicting interpretations of this provision, Br. at 13-15 – a point the agency does not deny – Sierra Club did not bring the present case because the agency changed its views but because EPA's claim to have satisfied its obligations under § 112(c)(6) is unlawful and arbitrary. Br. at 27-28, 29-30.

B. EPA's Argument That The Court Should Decline To Exercise Its Jurisdiction Is Without Merit.

EPA argues that even if the present case is timely, it should be dismissed because, in the agency's view, challenges to the "substantive adequacy of [] individual standards could and should have been raised in a challenge to the emission standards themselves." EPA Br. at 35. That argument merely restates EPA's mischaracterization of the present case as a challenge to the substance of individual standards. Because the present case is a timely petition for review of the Determination and does not seek review of any other rule, this Court has jurisdiction to review it, regardless of whether other past or future agency actions might also be reviewable. See 42 U.S.C. § 7607(b) (granting this Court jurisdiction to review any final action by EPA). EPA's professed belief that the issues raised here "could and should" have been raised in other cases lends no support to the agency's suggestion that the Court should take the extraordinary step of refusing to exercise its jurisdiction here. *See Bridges v. Kelly*, 84 F.3d 470, 475 (1996) (federal courts have "virtually unflagging obligation … to exercise the jurisdiction given them") (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

Further, EPA's claim that Sierra Club "could" have obtained review of EPA's implementation of § 112(c)(6) by challenging individual prior rules in the past is simply wrong. EPA issued its rules for coke ovens, chemical plants,

aerospace facilities, refineries, municipal waste combustors, and medical waste incinerators – which account for far more than ten percent of the emissions of PCBs, POM and HCB – before 1998, when the agency first indicated that it was counting on them to meet its obligations under § 112(c)(6). Br. at 10-12. None of these rules purport to establish standards for PCBs, POM, or HCB, either directly or through surrogates, nor do they contain any claim that EPA can satisfy § 112(c)(6) without setting such standards. Indeed, they do not even mention § 112(c)(6). Members of the public could not even have foretold that the agency would later rely on them to claim that it had satisfied § 112(c)(6)'s ninety percent requirement. Far less could they have demonstrated in a record review case that EPA's failure to include standards for emissions of PCBs, POM and HCB in these rules contravened that requirement. There was no way to know that EPA's failure to set standards for emissions of PCBs, POM, and HCB from these individual source categories would prevent the agency from meeting the ninety percent requirement either with subsequent standards or with standards for emissions of PCBs, POM, and HCB from other categories. In any event, EPA did not have to complete the required standards until November 15, 2000. 42 U.S.C. § 7412(c)(6).

Even after its 1998 listing was published, EPA could have brushed off § 112(c)(6) challenges to individual rules by pointing out that Congress gave it until November 15, 2000 to complete its obligations and claiming that it was going

to satisfy § 112(c)(6)'s ninety percent requirement with future rules. And even after 2000, EPA maintained that it was free to revise the list of source categories subject to § 112(c)(6), and the agency did revise it in 2002 and again upon issuance of the final Determination, which post-dates every rule on which EPA now seeks to rely. EPA, Emission Standards for Meeting the Ninety Percent Requirement Under Section 112(c)(6) of the Clean Air Act (February 18, 2011), EPA-HQ-OAR-2004-0505-0006 ("§ 112(c)(6) Memo"), at 5-14, JA__-__. Moreover, even if it had been possible to force EPA to include standards for PCBs, POM and HCB in all the post-1998 rules, doing so would not have brought the agency anywhere close to the ninety percent requirement. It is undisputed that the pre-1998 rules alone cover sources accounting for far more than ten percent of the emissions of these pollutants. Br. at 10-12.[3]

EPA's claim that Sierra Club "should" have challenged the agency's implementation of the ninety percent requirement in individual prior rules is both wrong (because the Clean Air Act provides for review of the Determination) and

[3] EPA's argument that the Court should decline to review the Determination because a handful of individual rules have been or could be reviewed individually for consistency with s 112(c)(6), EPA Br. at 31-34, misses the mark for the same reasons. Review of recently promulgated standards for cement plants, medical waste incinerators, or gold mines cannot substitute for review of whether EPA's failure to set standards for different categories is contrary to 112(c)(6), let alone for review of EPA's final determination of overall compliance with the ninety percent requirement.

directly at odds with EPA's representations to the district court in the deadline suit that led to the present litigation. Def. Opp. at 19 n16; EPA Br. at 13. Because EPA did not want the district court to decide whether the standards EPA had promulgated (or would promulgate in the future) satisfied § 112(c)(6)'s ninety percent requirement, EPA proposed the Determination as a judicially reviewable endpoint to its implementation of § 112(c)(6). Specifically, EPA represented that after issuing standards for all the categories it listed under § 112(c)(6) it would take final action "explain[ing] how" its standards collectively satisfy its § 112(c)(6) obligations:

> Sierra Club contends that the standards EPA has promulgated pursuant to section 112(c)(6) do not address PCBs. . . . This issue, however, is not a subject of the present motions. . . . [O]nce EPA completes emission standards for the remaining source categories under section 112(c)(6), it intends to issue a notice that explains how it has satisfied the requirements of section 112(c)(6) in terms of issuing emission standards for the source categories that account for the statutory thresholds identified in section 112(c)(6). That final action, like any other final action under the CAA, would be subject to judicial review in the D.C. Circuit pursuant to CAA section 307(b).

Def. Opp. at 19 n16, JA__. *See also* Def. Reply at 14, JA__; *Sierra Club v. Johnson*, 444 F. Supp. 2d 46, 59 (D.D.C. 2005) (*citing* Def. Opp. at 19 n16); *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (estopping the State of New Hampshire from taking inconsistent positions before two different courts in related litigation).

EPA's claim that reviewing the Determination "would require the Court to undertake the unwieldy task of indirectly considering the merits of numerous prior regulatory decisions," EPA Br. at 36, is wrong as well. As EPA itself points out, those prior regulatory decisions "are not part of the record for the 90 Percent Notice and are not before this Court." *Id.* at 37. Apart from the notice and comment issue, the only issue before the Court is whether EPA's Determination that it has fully satisfied § 112(c)(6) is unlawful or arbitrary given that: (1) § 112(c)(6) undisputedly required EPA to set standards for the PCBs, POM, and HCB emitted by the sources EPA listed under § 112(c)(6); and (2), the agency has not done so. Br. at 27-28, 29-30. EPA's brief confirms that there is absolutely no record evidence that EPA set the required standards. *See infra* at 19-20. Thus, based on the only record "before this Court," EPA Br. at 37, the Determination is arbitrary. Vacating the Determination will allow EPA either to set the missing standards or to provide a record basis for claiming that it has satisfied the requirements of § 112(c)(6).[4]

[4] EPA's lawyers now argue, based on materials that are not in the record, that EPA set the required standards via surrogates. EPA Br. at 40, 43-48. Even if the Court chooses to evaluate these *post hoc* extra-record claims, however, reviewing the Determination would hardly be an "unwieldy task." As shown below, EPA's lawyers cannot identify any part of the underlying rules in which the agency even claimed to have set standards for PCBs, POM and HCB, directly or through surrogates. *See infra* at 20-24.

III. EPA'S CLAIM TO HAVE SATISFIED CLEAN AIR ACT § 112(c)(6) IS UNLAWFUL AND ARBITRARY.

A. EPA's Brief Confirms That The Agency Has Not Satisfied § 112(c)(6).

As EPA has admitted repeatedly, § 112(c)(6) unambiguously requires it either to set standards for all the hazardous air pollutants that the sources listed under § 112(c)(6) emit or to set standards for the § 112(c)(6) pollutants that these sources emit. *See* Br. at 28 (*quoting* 76 Fed. Reg. 9,450, 9,457/1-2 (February 17, 2011), JA__). *See also* 76 Fed. Reg. 15,554, 15,567-2-3 (March 21, 2011), JA__. Indeed in a brief currently before this Court, EPA concedes that by directing it to set standards "under subsection (d)(2)," § 112(c)(6) requires the agency to set standards for at least the § 112(c)(6) pollutants. Brief for Respondent at 32, Desert Citizens Against Pollution v. EPA, D.C. Cir. No. 11-1113, JA__ ("when establishing emission standards for sources listed pursuant to section 112(c)(6), EPA reasonably interprets the phrase 'HAPs subject to this section' [in § 112(d)(2] to refer to the section 112(c)(6) pollutants emitted from the listed source category that must be regulated to satisfy the ninety percent requirement in section 112(c)(6)."). As explained in Sierra Club's opening brief, EPA has not met this requirement. Br. at 27-28, 29-30.

EPA does not dispute that the Clean Air Act requires it to set standards for the emissions of PCBs, POM, and HCB from the sources it lists under § 112(c)(6). To the contrary, EPA agrees: "Provided that EPA has set standards pursuant to

sections 112(d)(2) or (d)(4) (or equivalent standards) for substances identified as surrogates for the section 112(c)(6) HAPs, EPA has fully met its obligation to set standards assuring that sources accounting for 90 percent of the aggregate emissions of the section 112(c)(6) pollutants at issue are subject to standards." EPA Br. at 40. EPA argues incorrectly, however, that the present case is about whether EPA can issue standards for the § 112(c)(6) pollutants via surrogates. According to EPA, Sierra Club "implies" that EPA cannot use surrogates and that the agency can only satisfy § 112(c)(6) by setting specific individual standards for each of the pollutants that § 112(c)(6) enumerates. *Id.* at 39.

Sierra Club did not "impl[y]" that EPA cannot set surrogate standards for the § 112(c)(6) pollutants, nor did it have any reason to do so. As EPA's brief confirms, the agency does not and cannot identify any part of the record in which it claimed that sources accounting for ninety percent of the emissions of PCBs, POM, and HCB were "subject to standards" for these pollutants either directly or through surrogates. Far less does EPA identify record evidence that could possibly support such a claim. Because it is undisputed that to satisfy § 112(c)(6) EPA must at least "set standards pursuant to sections 112(d)(2) or (d)(4) (or equivalent standards) for substances identified as surrogates for the section 112(c)(6) HAPs," *id.* at 40, the complete absence of record evidence that the agency did so renders EPA's claim to have satisfied § 112(c)(6) arbitrary and capricious. Br. at 29-30.

See Cablevision Systems Corp. v. FCC, 597 F.3d 1306, 1310 (D.C. Cir. 2010) ("We will vacate an agency's decision as arbitrary and capricious if its factual determinations lack substantial evidence...."); *Ridgely v. Marsh*, 866 F.2d 1526, 1529 (D.C. Cir. 1989) ("[W]e cannot escape the conclusion that the Board's action was arbitrary and capricious, because we can find no record evidence whatever to support the Board's 'opinion[.]'").

B. EPA's Lawyers' *Post Hoc* Attempt To Support EPA's § 112(c)(6) Determination With Extra-Record Evidence Is Impermissible And Without Merit.

1. EPA's Lawyers' New Argument Is A *Post Hoc* Rationale Based On Extra-Record Evidence.

In an attempt to explain how EPA's Determination comports with § 112(c)(6), EPA's lawyers now argue that, although the agency did not set standards for the PCBs, POM or HCB, the agency has met its obligation by setting other standards that control these pollutants to some extent. EPA Br. at 43-48. EPA itself made no such claim, and EPA's lawyers do not identify any portion of the record where any such claim appears. For this reason alone, EPA's lawyers' new rationale must be rejected as an impermissible *post hoc* rationale. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("courts may not accept appellate counsel's *post hoc* rationalizations for agency action"); *Florida Power & Light Co. v. FERC*, 85 F.3d 683, 689 (D.C. Cir. 1996)

("the agency runs this regulatory program, not its lawyers; parties are entitled to the agency's analysis of its proposal, not post hoc salvage operations of counsel").

Further, EPA's lawyers seek to base their argument not on any evidence in the record for the Determination but on statements in the underlying § 112 and § 129 rules. As EPA itself argues, those statements "are not part of the record for the 90 percent Notice and are not before this Court." EPA Br. at 37. *Accord Kappos v. Hyatt*, 132 S. Ct. 1690, 1696 (2012) ("Under the APA, judicial review of an agency decision is typically limited to the administrative record.") (citing 5 U.S.C. § 706).

2. EPA's Lawyers' New Argument Is Without Merit.

Even if EPA's lawyers' new argument could be considered, their discussion of the agency's § 112 and § 129 rules merely confirms that these rules do not set emission standards for PCBs, POM, or HCB either directly or through surrogates. With two exceptions, EPA's lawyers do not even claim that EPA set surrogate standards for PCBs, POM, or HCB. Instead, they rely in some instances on vague claims by EPA that the standards it did set provide some unspecified level of control for these pollutants and, in others, on their own opinion that the standards EPA set provide some unspecified level of control. EPA Br. at 43-48.

Specifically,

- For pesticide manufacturing and chemical manufacturing, source categories that account for more than ninety-nine percent of all HCB emissions, Br. at 11-12, EPA's lawyers cannot identify anything in EPA's rules that even suggests EPA set standards for HCB through a surrogate. They instead seek to rely on preamble statements that HCB "will be reduced," EPA Br. at 44 (*quoting* 64 Fed. Reg. 33,550, 33,552-53 (June 23, 1999)), or is on a list of "regulated" pollutants, EPA Br. at 45 (*citing* 59 Fed. Reg. 19,402, 19,405 (April 22, 1994)).
- For coke ovens, aerospace facilities and petroleum refineries, which account for more than thirty-nine percent of all POM emissions, Br. at 11-12, EPA's lawyers effectively concede that EPA said nothing at all about POM emissions and did not purport to identify or set standards for a surrogate for POM. They attempt to rely on their own opinion that setting standards for coke oven emissions generally or for organic HAP emissions generally was good enough. EPA Br. at 44-46.[5]
- With respect to municipal waste combustors, EPA's lawyers' argue that EPA's standards "provide MACT-type standards for control of combustion, which controls PCB emissions because PCBs are byproducts of combustion." *Id.* at

[5] EPA's lawyers' claims that Sierra Club did not challenge the underlying coke ovens rule (EPA Br. at 45, *see also id.* at 46, 48 (same)) is a rehash of the agency's arguments on timeliness, and is addressed above at 14-17.

47. Remarkably, they ignore the agency's own unequivocal denial that it set standards for PCBs either directly or through surrogates:

> The EPA does not believe that either section 129 or section 112(c)(6) require it to establish numerical limits for PCB and POM emissions from large MWC in order to take credit for reductions in emissions of those pollutants arising from compliance with the large MWC NSPS and emission guidelines in fulfilling its obligations under section 112(c)(6). In addition, contrary to the commenter's contention, EPA did not purport to use other pollutants emitted by large MWC as surrogates for PCB and POM.

EPA, Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Large Municipal Waste Combustors, Summary of Public Comments and Responses for December 19, 2005 Proposed Rule at 7-8, JA__-__.

Clean Air Act § 112(c)(6) does not require EPA merely to announce that emissions of the PCBs, POM and HCB "will be reduced" or are "regulated" or "control[led]." As EPA admits, the agency must at least "set standards pursuant to sections 112(d)(2) or (d)(4) (or equivalent standards) for substances identified as surrogates for the section 112(c)(6) HAPs." EPA Br. at 40 (emphasis added). And, as EPA's brief confirms, nothing in the rules on which EPA's lawyers seek to rely supports their claim that EPA set such standards.

Finally, EPA's lawyers correctly point out that EPA did claim to have set standards for substances identified as surrogates for PCBs when it issued revisions to its rules for medical waste incinerators and hazardous waste combustors. EPA

Br. at 47-48.[6] Those claims, however, merely confirm that EPA knows how to claim that it is regulating hazardous air pollutants through surrogates when it wishes to do so – underscoring that EPA made no such claims in the other rules where EPA's lawyers now seek to insert them. Even if accepted as valid, EPA's claims in those rule revisions do not show that the agency has met § 112(c)(6)'s ninety percent requirement with respect to PCBs (or POM or HCB), but merely that EPA has established surrogate standards for PCBs in rules that account for less than ninety percent of PCBs emissions, Br. at 12-13.[7]

IV. EPA'S FAILURE TO PROVIDE NOTICE AND OPPORTUNITY TO COMMENT ON THE DETERMINATION CONTRAVENED § 706 OF THE ADMINISTRATIVE PROCEDURE ACT.

EPA does not deny that the Determination is a reviewable final action or that it has the purpose and effect of cutting off the agency's statutory duty to set emission standards under § 112(c)(6). Br. at 31-32, 34-35. Now that the Determination has served this purpose, however, EPA attempts to trivialize it as a mere "bookkeeping action" that "'left the world just as it found it.'" EPA Br. at 50 (*quoting Independent Equipment Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C.

[6] EPA's lawyers do not dispute that when EPA originally promulgated those standards it did not claim that it was regulating PCBs via surrogates. *See* Br. at 12-13.

[7] The present case does not challenge the surrogacy claims EPA made in its revisions to the medical waste incinerators and hazardous waste combustors rules.

Cir. 2004)). The agency argues that its Determination was such a trivial and meaningless action that it was not a "rule" under the APA or, at most, was an interpretive rule rather than a legislative one and, in either event, not subject to the APA's notice and comment requirements. *Id.* at 50-54.

The Determination does not leave the world "just as it found it,'" EPA Br. at 50. Rather, as its plain text demonstrates, the Determination effectuates EPA's conclusion that the agency has "completed sufficient standards to meet the 90 requirement under … section 112(c)(6)." 76 Fed. Reg. at 15,308/3, JA__. Before issuing the Determination EPA was subject to an unmet statutory duty to issue standards for emissions of PCBs, POM, and HCB from sources accounting for ninety percent of the aggregate emissions of these pollutants. The Determination purports to relieve EPA of this duty even though EPA has not set the required standards. Thus, the Determination "effects 'a substantive regulatory change' to the statutory or regulatory regime." EPA Br. at 52 (*quoting Elec. Privacy Info. Ctr. v. DHS*, 653 F.3d 1, 6-7 (D.C. Cir. 2011)). *See NRDC v. EPA*, 643 F.3d 311, 320-321 (D.C. Cir. 2011) (when agency action "change[s] the law," the question of "whether it is a legislative rule that required notice and comment [] is easy."). Further, that regulatory change "jeopardizes the rights and interests" of Sierra Club by depriving Sierra Club members of protection that the undisputedly required emission standards for PCBs, POM, and HCB would provide. *Env. Defense Fund*

v. Gorsuch, 713 F.2d 810, 815 (D.C. Cir. 1983) (agency action that "jeopardizes the rights and interests of parties … must be subject to notice and comment prior to taking effect") (*quoting Batterton v. Marshall*, 648 F.2d 694, 708 (D.C. Cir. 1980). *See generally Batterton*, 648 F.2d at 704 ("The APA broadly defines rules subject to § 553 procedures, and carves out only limited exceptions."); *Alcatraz v. Block*, 746 F.2d 593, 612 (D.C. Cir. 1984) (exceptions to notice and comment requirements are to be "construed narrowly and only reluctantly countenanced").

EPA's current justification for skipping notice and comment conflicts not only with the purpose and effect of its Determination but with the agency's concession in its current brief that the Determination "is a final agency action subject to judicial review pursuant to 42 U.S.C. 7607(b)(1)," EPA Br. at 1. To be final and reviewable, an agency action "must be one 'by which rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (emphasis added) (*quoting Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). Thus, by conceding that the Determination is reviewable final action, EPA necessarily concedes that it did not leave the world "just as it found it," EPA Br. at 50, but instead had "legal consequences," *Bennett*, 520 U.S. at 178. *See NRDC*, 643 F.3d at 321; *Elec. Privacy Info. Center*, 653 F.3d at 6-7. Conversely, by arguing that the Determination "changed nothing" and therefore did not require

notice and comment, EPA Br. at 51, EPA effectively asks the Court to disregard its concession and treat the Determination as though it were not reviewable final action. *Cf.* EPA Br. at 1; Def. Opp. at 19 n16, JA__. Indeed, the cases on which EPA now relies for its claim that the Determination did not require notice and comment, EPA Br. at 50, confirm this point; both address actions that this Court found unreviewable. *See Independent Equipment Dealers*, 372 F.3d at 427-428 (holding action "unreviewable" under Clean Air Act § 307(b)); *Industrial Safety Equipment Ass'n v. EPA*, 837 F.2d 1115, 1122 (D.C. Cir. 1988) (holding agency action to be not "reviewable").

EPA argues that the Determination did not "set forth any construction of section 112(c)(6) that EPA had not already explained and relied upon in promulgating individual emission standards." EPA Br. at 51. The agency further claims (now) that it was not required to issue the Determination and that it was the agency's individual rules under § 112(c)(6) rather than the Determination, "that cumulatively discharged EPA's legal obligations under the CAA." *Id. See id.* at 53 (same). The Determination proclaims, however, that "EPA has completed sufficient standards to meet the 90 percent requirement under … section 112(c)(6)." 76 Fed. Reg. at 15,308/3, JA__ (emphasis added). Although EPA chose not to articulate its interpretation of § 112(c)(6) in the Determination (or elsewhere in the record), Br. at 29, the agency's claim to have done what a specific

statutory provision "require[s]" necessarily reflects and implements an interpretation of the statute.

Further, contrary to EPA's current assertions (at 50), the agency has never before claimed to have met the ninety percent requirement or attempted to explain any such claim. Indeed, EPA expressly represented to the district court that it would provide such an explanation only in the Determination and only after issuing rules for all the source categories it listed under § 112(c)(6). Def. Opp. at 19 n16, JA__. EPA itself devised the Determination as a judicially reviewable endpoint to its implementation of § 112(c)(6) precisely because it did not want a district court to determine whether or not the rules it had set "cumulatively discharged EPA's legal obligations," EPA Br. at 51. Def. Opp. at 19 n16, JA__; Def. Reply at 14, JA__.

Finally, EPA argues that the only issue within the scope of its Determination was "the simple calculation of whether the source categories that it had already listed and subjected to MACT or health-based emission standards accounted for 90 percent of the baseline emissions of the section 112(c)(6) HAPs." EPA Br. at 54. Because Sierra Club's comments would have addressed whether these standards actually met the agency's obligations under § 112(c)(6), EPA argues that "Sierra Club's input would not have improved the Agency's performance … or provided useful information to EPA." *Id.*

EPA cannot avoid the APA's notice and comment requirements just by stating, after the fact, that it would have ignored the comments it might have received. Such argument is irrelevant under APA § 553, which requires EPA to provide notice and comment opportunity in all rulemakings. 5 U.S.C. § 553(b)-(c). As a practical matter, the comments EPA received may have prevented EPA from issuing the Determination or, at a minimum, inspired the agency to provide some statutory and record basis for its claim to have met § 112(c)(6)'s requirement. By forging ahead without notice and comment, EPA reached a conclusion that conflicts directly with its own interpretation of the Clean Air Act and frustrates Congress's "obvious[] inten[t]" to control emissions of PCBs, POM, and HCB. 76 Fed. Reg. at 9,457, JA__. *See* Br. at 37.

CONCLUSION

For the reasons given in its opening brief and above, Sierra Club respectfully requests that this Court vacate the Determination.

Dated: April 30, 2012

Respectfully submitted,
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CERTIFICATE REGARDING WORD LIMITATION

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing Proof Reply Brief of Petitioner contains 6,977 words, as counted by counsel's word processing system.

DATED: April 30, 2012

/s/ James S. Pew
James S. Pew

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April, 2012 I have served the foregoing **Proof Reply Brief of Petitioner** on all registered counsel through the Court's electronic filing system (ECF).

/s/ James S. Pew
James S. Pew